IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

GERDA ZINNER, ET AL.,	)	
	)	
Plaintiffs,	)	
v.	)	Civil Action No. 3:23-cv-00535
	)	
	)	Judge Aleta A. Trauger
THE STATE OF TENNESSEE, ET AL.,	)	
	)	
Defendants.	)	JURY TRIAL DEMANDED

PLAINTIFFS' RESPONSE TO DEFENDANTS' NOTICE OF FILING OF SUPPLEMENTAL AUTHORITY

Plaintiffs respectfully submit this Response to Defendants' Notice of Filing of Supplemental Authority in support of their Motion to Dismiss (Doc. 122). Defendants call the Court's attention to several APA challenges to the U.S. Department of Education and the U.S. Department of Health and Human Services' guidance and final rulemakings on Title IX. (Defs' Ex. A–E). These decisions have no bearing on Plaintiffs' case.

Denials of a stay of a preliminary injunction are not final decisions on the merits and are not binding on this Court. *See Penn. State. Conf. of NAACP v. Schmidt,* 703 F. Supp. 3d 632, 674 (W.D. Penn. 2023) ("[D]ecisions to deny a stay have no precedential value.") (citation omitted), *rev'd on other grounds*, 97 F.4th 120 (3d Cir. 2024); *Univ. of Texas v. Camenisch*, 451 U.S. 390, 395 (1981) ("The purpose of a preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held."). As the Supreme Court emphasized in its denial of the Department of Education's emergency application for a stay in *Dep't of Educ. v. Louisiana*, the Court considered the Department's arguments "[i]n [an] emergency posture" and

"[o]n [a] limited record," and further noted that the Sixth Circuit had already scheduled oral argument before a merits panel in October. 2024 WL 3841071, at *1 (Aug. 16, 2024).

To the extent Defendants rely on the Sixth Circuit's denial of a stay in *Tennessee v. Cardona*, 2024 WL 3453880 (6th Cir. July 17, 2024), and other, out-of-circuit cases regarding the Department of Health and Human Services' final rule interpreting Title IX, those decisions are inconsistent with binding and persuasive Sixth Circuit precedent concluding that it is "settled law in this Circuit" that Title IX prohibits discrimination based on "[s]ex stereotyping" and "gender nonconformity." *Dodds v. U.S. Dep't of Educ.*, 845 F.3d 217, 221–22 (6th Cir. 2016) (per curiam) (citing *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004)); *see also Charlton-Perkins v. Univ. of Cincinnati*, 35 F.4th 1053, 1061–64 (6th Cir. 2022) (applying Title VII precedent to Title IX university employment discrimination claim).

Plaintiffs filed their First Amended Complaint well before the Department of Education and the Department of Health and Human Services issued their final rules, and Plaintiffs' Title IX claims do not rely on agency interpretation. (Doc. 89) The arguments Plaintiffs advance and the precedents on which they rely in their Opposition to Defendants' Motion to Dismiss (Doc. 101) remain in full force and effect.

For these reasons, Defendants' supplemental authorities are unpersuasive.

Dated: September 4, 2024

Respectfully submitted,

/s/ Darren Teshima
Darren Teshima (admitted *pro hac vice*)
Udit Sood (admitted *pro hac vice*)
COVINGTON & BURLING, LLP
Salesforce Tower
415 Mission Street, Suite 5400
San Francisco, California 94105-2533
Telephone: (415) 591-6000
Facsimile: (415) 591-6091
E-mail: dteshima@cov.com
E-mail: usood@cov.com

Suzan F. Charlton (admitted *pro hac vice*)
Natalie Ritchie (admitted *pro hac vice*)
Elaine H. Nguyen (admitted *pro hac vice*)
COVINGTON & BURLING, LLP
One CityCenter
850 Tenth Street, NW
Washington, D.C. 20001-4956
Telephone: (202) 662-6000
Facsimile: (202) 778-5465
E-mail: scharlton@cov.com
E-mail: nritchie@cov.com
E-mail: enguyen@cov.com

James A. Holloway (admitted *pro hac vice*)
COVINGTON & BURLING, LLP
1999 Avenue of the Stars, Suite 3500
Los Angeles, CA 90067-4643
Telephone: (424) 332-4800
Facsimile: (424) 332-4749
E-mail: jholloway@cov.com

Attorneys for Plaintiffs

/s/ J. Scott Hickman
Scott Hickman (No. 17407)
SHERRARD ROE VOIGT & HARBISON, PLC
1600 West End Avenue, Suite 1750
Nashville, TN 37203
Telephone: (615) 742-4200
Facsimile: (615) 742-4539
shickman@srvhlaw.com

Attorney for Plaintiffs

/s/ Phillip F. Cramer
Phillip F. Cramer (No. 20697)
SPERLING & SLATER, LLC
1121 Broadway, Suite 2140
Nashville, TN 37203
Telephone: (615) 742-4535
pcramer@sperling-law.com

Attorney for Plaintiffs

/s/Ezra Cukor
Ezra Cukor (admitted *pro hac vice*)
Z Gabriel Arkles (admitted *pro hac vice*)
Shayna Medley (admitted *pro hac vice*)
TRANSGENDER LEGAL DEFENSE
AND EDUCATION FUND, INC.
520 8th Ave, Ste. 2204
New York, NY 10018
Telephone: (646) 862-9396
Facsimile: (646) 993-1686
garkles@transgenderlegal.org
ecukor@transgenderlegal.org
smedley@transgenderlegal.org

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on September 4, 2024, the undersigned filed the foregoing document using the Court's Electronic Court-Filing system, which sent notice of filing to the following counsel of record:

COUNSEL OF RECORD	PARTY REPRESENTED
Steven J. Griffin (Bar No. 40708) Ryan N. Henry (Bar No. 40028) Reed N. Smith (Bar No. 40059) Brooke A. Huppenthal (Bar No. 40276) Office of the Tennessee Attorney General & Reporter P.O. Box 20207 Nashville, TN 37202-0207 Phone: 615-741-9598 steven.griffin@ag.tn.gov ryan.henry@ag.tn.gov reed.smith@ag.tn.gov brooke.huppenthal@ag.tn.gov	Counsel for State Defendants
David M. Sanders (Bar No. 016885) Jessica Jernigan-Johnson (Bar No. 032192) Knox County, Tennessee 400 W. Main St., Suite 612 City-County Building Knoxville, Tennessee 37902 Telephone: 865-215-3236 Facsimile: 865-215-2936 david.sanders@knoxcounty.org jessica.johnson@knoxcounty.org	Counsel for Defendant Knox County Board of Education
Kimberly S. Veirs S. Jae Lim Ejaz H. Baluch, Jr. Jennifer M. Swedish United States Attorney's Office 719 Church Street, Suite 3300 Nashville, TN 37203 Telephone: (615) 736-5151 kimberly.veirs@usdoj.gov jae.lim@usdoj.gov ejaz.baluch@usdoj.gov jennifer.swedish@usdoj.gov	Counsel for Interested Party United States of America